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VITAL PHARMACEUTICALS, INC., d/b/a VPX SPORTS;
and JOHN H. OWOC, a.k.a. JACK OWOC

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MONSTER ENERGY COMPANY, a
Delaware corporation,

Plaintiff,

vs.

VITAL PHARMACEUTICALS, INC.,
d/b/a VPX SPORTS, a Florida
corporation; and JOHN H. OWOC a.k.a.
JACK OWOC, an individual,

Defendants.

CASE NO.: 18-cv-1882-JGB-SHK

**DEFENDANT VITAL
PHARMACEUTICALS, INC.'S
ANSWER TO COMPLAINT AND
AFFIRMATIVE DEFENSES;**

DEMAND FOR JURY TRIAL

Dist. Judge: Hon. Jesus G. Bernal
Mag. Judge: Hon. Shashi H.
Kewalramani

1 Defendant VITAL PHARMACEUTICALS, INC., d/b/a VPX SPORTS
 2 (“Defendant”) hereby responds on behalf of itself, and no other,¹ to the Complaint
 3 (Dkt. No. 1) of Plaintiff MONSTER ENERGY COMPANY (“Plaintiff”) as
 4 follows:

5 1. Pursuant to Rule 8(b)(3) of the Federal Rules of Civil Procedure,
 6 Defendant generally denies each and every allegation contained in the complaint
 7 except those expressly admitted below.

8 2. Defendant admits the allegations of the following paragraphs: 15; and
 9 24.

10 **PRAYER FOR RELIEF**

11 Defendant denies that Plaintiff is entitled to any of the items set forth in the
 12 prayer for relief.

13 **AFFIRMATIVE DEFENSES**

14 1. Plaintiff’s Complaint was brought in the improper venue relative not
 15 only to the convenience of the parties and witnesses, but also the locale of the
 16 totality of the alleged wrongful conduct. Furthermore, Defendant’s principal place
 17 of business is Florida. In addition, to the extent this case is being brought on
 18 behalf of or for the benefit of the general public, this case was not brought in the
 19 proper venue. Therefore, Defendant expressly reserves all rights and remedies
 20 afforded it under 28 U.S.C. § 1404.

21 2. This court lacks subject matter jurisdiction over the state court claims
 22 relative to any dismissal or judgment concerning the federal question claims. 28
 23 U.S.C. § 1367.

24 3. This court lacks personal jurisdiction over Defendant and expressly
 25 reserves all rights and remedies afforded it under Federal Rule of Civil Procedure
 26 12(b)(2); *Imageline, Inc. v. Hendricks*, 2009 U.S. Dist. LEXIS 71125, *3-5, fn. 1
 27

28 ¹ Defendant John H. Owoc is separately responding to the Complaint.

1 (C.D. Cal. 2009).

2 4. Plaintiff's claims are barred for lack of standing.

3 5. Plaintiff's Complaint does not allege facts sufficient to state any claim
4 or controversy pursuant to Federal Rule of Civil Procedure 12(b)(6).

5 6. Plaintiff's Complaint fails to allege facts regarding actionable
6 expressions of fact as opposed to statements of opinion.

7 7. Plaintiff's Complaint fails because the complained of statements of
8 fact, to the extent they are not opinions, amount to mere puffery.

9 8. Plaintiff's Complaint does not allege facts sufficient to allow for the
10 award of any punitive and/or exemplary damages pursuant to California Civil Code
11 § 3294.

12 9. Plaintiff's claims for punitive damages are barred, in whole or in part,
13 because punitive damages are not recoverable in cases brought under the Lanham
14 Act.

15 10. Defendant is informed and believes and thereon alleges that the
16 applicable statutes of limitation may bar all Claims for relief in the Complaint.

17 11. Defendant is informed and believes and thereon alleges that any
18 alleged damages sustained by Plaintiff were, at least in part, caused by the actions
19 of Plaintiff and resulted from Plaintiff's own negligence or other conduct, which
20 equaled or exceeded any alleged negligence or conduct by Defendant.

21 12. Defendant is informed and believes and thereon alleges that any
22 purported damages allegedly suffered by Plaintiff are the result of the acts or
23 omissions of third persons over whom Defendant had neither control nor
24 responsibility, and whom Plaintiff has failed to name in this action.

25 13. The Complaint and each of its purported claims for relief are barred
26 by the doctrine of estoppel.

27 14. The Complaint and each of its purported claims for relief are barred
28 by the doctrine of laches.

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1 15. The Complaint and each of its purported claims for relief are barred
2 by the doctrine of unclean hands.

3 16. The Complaint and each of its purported claims for relief are barred
4 by the doctrine of waiver.

5 17. Defendant alleges that at all times it acted in good faith and with good
6 cause. The conduct of Defendant was within the reasonable expectations of the
7 parties and was reasonably related to Defendant's legitimate business interests
8 upon the basis of reasonable factors.

9 18. Each state law claim in the Complaint is barred because federal law
10 (including but not limited to the Federal Food, Drug, and Cosmetic Act and
11 Lanham Act) preempts this action in whole or in part.

12 19. Plaintiff's claims are barred by the doctrine of primary jurisdiction.
13 (*Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008).)

14 20. Plaintiff's claims are barred by res judicata and/or collateral estoppel.

15 21. Plaintiff's claims are barred in whole or in part by Defendant's free
16 speech guarantees of the First Amendment to the United States Constitution, the
17 Due Process Clause of the Fourteenth Amendment to the United States
18 Constitution, the Takings Clause of the Fifth Amendment to the United States
19 Constitution (as incorporated by the Due Process Clause of the Fourteenth
20 Amendment to the United States Constitution), and the analogous provisions
21 contained in the California Constitution.

22 22. Plaintiff's claims are barred under California Civil Code § 47(c).

23 23. This action is barred, in whole or in part, because the advertisements
24 and product labels at issue provided clear and appropriate descriptions of the
25 ingredients in Defendant's products.

26 24. This action is barred, in whole or in part, because no advertisements
27 or labels for Defendant's products contain or contained any false or misleading
28 statements or promises or promised any good not intended to be delivered. As

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1 such, the advertisements and product labels are not, and were not, deceptive, false,
2 misleading, fraudulent, unlawful, and/or unfair, and were not intended to mislead
3 or deceive consumers.

4 25. Plaintiff's claims as related to allegations of statements published by
5 Defendant are barred, in whole or in part, because the statements were true or the
6 defendant had a good faith belief that the statement was true.

7 26. Plaintiff's claims as related to allegations of statements published by
8 Defendant are barred because Plaintiff has failed to plead or prove scientific
9 studies, reproducible research, or material facts establishing that the challenged
10 statements are, as alleged, deceptive, false, misleading, fraudulent, unlawful, or
11 unfair, or, again, as alleged, intended to mislead or deceive consumers.

12 27. Plaintiff's claims as related to allegations of statements published by
13 Defendant are barred because Plaintiff has failed to plead or prove scientific
14 studies, reproducible research, or material facts reflecting that the ingredients and
15 amounts thereof appearing on the labels of VPX's BANG® brand of challenged
16 products are incorrect.

17 28. Plaintiff's claims are barred because, to the extent VPX rendered any
18 actionable opinions regarding the possible benefits of creatine on the regular aging
19 and cognitive brain processes, VPX reasonably relied on published medical
20 literature in the existing scientific community regarding this subject.

21 29. Plaintiff's claims regarding the validity of VPX's Super Creatine®
22 patent are barred until, at a minimum, the exhaustion of VPX's review and
23 appellate rights.

24 30. Plaintiff has not suffered any economic harm or injury in fact that was
25 caused by any act or omission of Defendant.

26 31. Plaintiff's claims are barred, in whole or in part, because the damages
27 sought by Plaintiff are speculative, remote, and/or impossible to ascertain.

28 32. Plaintiff's claims for equitable relief are barred to the extent there is,

1 or Plaintiff asserts that there is, an adequate remedy at law.

2 33. Plaintiff's request for attorney's fees is unauthorized, contrary to
3 public policy, and/or prohibited by applicable law.

4 34. Defendant alleges that portions of the Complaint do not describe the
5 alleged actions and/or in actions with sufficient particularity to permit it to
6 ascertain what other defenses may exist at this time. Defendant therefore reserves
7 the right to assert all defenses that may pertain to the Complaint as the facts of the
8 case are discovered pursuant to Federal Rule of Civil Procedure 15.

9 **WHEREFORE**, Defendant prays as follows:

10 1. That judgment on the Complaint and on each cause of action be
11 entered in favor of Defendant;

12 2. That Plaintiff take nothing by way of the Complaint herein and that
13 this action is dismissed in its entirety with prejudice;

14 3. That Plaintiff's request for injunctive relief be denied;

15 4. That Defendant be awarded its fees and costs incurred in defending
16 this action to the extent permitted by law;

17 5. That Defendant be granted such other and further relief as the Court
18 may deem just and proper.

19 Dated: April 1, 2019

**GORDON REES SCULLY
MANSUKHANI, LLP**

By: /s/ Timothy K. Branson

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VITAL PHARMACEUTICALS,
INC., dba VPX SPORTS and JOHN
H. OWOC aka JACK OWOC

DEMAND FOR JURY TRIAL

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that Defendant demands a trial by jury in this action pursuant to Federal Rules of Civil Procedure, Rule 38(b) and Local Rule 38-1.

Dated: April 1, 2019

**GORDON REES SCULLY
MANSUKHANI, LLP**

By: /s/ Timothy K. Branson

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CERTIFICATE OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: Gordon Rees Scully Mansukhani, 101 W. Broadway, Suite 2000, San Diego, CA 92101, my electronic mail address is mcerezo@grsm.com. On April 1, 2019, I served the foregoing document(s) entitled: **ANSWER TO COMPLAINT** as follows:

☒ **BY ELECTRONIC SERVICE THROUGH THE CM/ECF SYSTEM** which automatically generates a Notice of Electronic Filing at the time said document is filed to all CM/ECF Users who have appeared in this case. Service with this NEF constitutes service pursuant to FRCP 5(b)(E).

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I declare under penalty of perjury under the laws of the United States of America that the above is true and correct and that I am employed in the office of a member of the bar of this court at whose direction this service was made.

Executed on April 1, 2019 at San Diego, California.



Maria G. Cerezo